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KEMENTERIAN KEWANGAN MALAYSIA & ANOR v. HA PACK INDUSTRY SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LIM CHONG FONG JCA
AZHAHARI KAMAL RAMLI JCA
B AHMAD KAMAL MD SHAHID JCA
[CIVIL APPEAL NOS: P-01(A)-422-06-2024
& P-01(A)-423-06-2024]
24 NOVEMBER 2025

C

Abstract – *(i) In a licenced manufacturing warehouse ('LMW') regulatory framework, the nature of a transaction, whether it is an export sale or a local sale, is determined strictly by mandatory documentary evidence and adherence to established regulatory procedures rather than the mere physical movement or intent of the goods; (ii) Under s. 65A(3)(b) of the Customs Act 1967, import duty is automatically exigible on all goods released from an LMW. Tax exemption is a conditional privilege, not a right. Therefore, any breach of licence conditions renders the goods liable to tax by operation of law.*

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ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash decision of Minister of Finance and Director General of Customs – Licenced manufacturing warehouse – Breach of licence conditions – Whether decision to impose import duties and goods and services tax (GST) irrational or ultra vires – Whether refusal to grant full remission of duties lawful exercise of discretion –*
F *Customs Act 1967, ss. 14A & 65A(3)(b)*

CUSTOMS & EXCISE: *Duty – Exemption – Licenced manufacturing warehouse ('LMW') – Drop shipment deliveries – Goods delivered to local trading company for onward delivery to other LMWs – Whether transactions constituted 'export sales' or 'local sales' – Failure to comply with mandatory documentary requirements under*
G *Perintah Tetap Kastam Bil. 27 – Usage of Customs Form 9 instead of Borang GPB-1 – Effect of non-compliance – Whether tax liability arose automatically upon breach of conditions – Customs Act 1967, s. 65A(3)(b)*

The present appeals arose from the dispute which centred around 675 drop
H shipment deliveries of raw materials from HA Pack Industry Sdn Bhd ('applicant'), a licenced manufacturing warehouse ('LMW') operator, to two other LMWs, namely Syarikat Sin Kwang Plastic Industries Sdn Bhd ('Sin Kwang') and Wentel Corporation Sdn Bhd ('Wentel'). These transactions involved a local trading company, Stephen Gould Malaysia Sdn
I Bhd ('Stephen Gould'), which ordered goods from the applicant for direct delivery to Sin Kwang and Wentel. The applicant declared the said deliveries using Customs Form 9. Pursuant to an audit conducted on the applicant,

Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia ('second respondent') took the position that the said deliveries were all local sales and, accordingly, issued bills of demand, demanding payment of goods and services tax (GST) amounting to RM102,312.14 as well as the payment of import duties amounting to RM1,705,202.31. Dissatisfied with the issuance of the bills of demand, the applicant appealed to the second respondent and, pending the appeal, made payments totalling RM903,757.22, *ie*, 50% of the total sum demanded. The applicant's appeal was rejected on the grounds that: (i) it did not fulfil the conditions of 'drop shipment' terminology and drop shipment sale involving LWM completed goods pursuant to Butiran 3.7 and Butiran 11, Perintah Tetap Kastam Bil. 27 dated 2 June 2017 ('PTK Bil. 27'); (ii) the delivery orders were acknowledged receipt by Stephen Gould instead of Sin Kwang and Wentel; and (iii) the movement of the goods was declared using Customs Form 9, showing that they were local sales. The applicant's further appeal to Kementerian Kewangan Malaysia ('first respondent') and the second respondent only resulted in an unpaid remission of 50% of the total sum. The applicant's application/appeal for the remission of the remaining 50% already paid under the bills of demand was rejected with finality. Aggrieved by the decision above, the applicant filed for a judicial review at the High Court. The High Court Judge ('HCJ') found that: (i) the decision to impose import duties and GST due to the alleged non-fulfilment of the definition of drop shipment under Butiran 3.7 of PTK Bil. 27 was irrational and without basis; (ii) the mere fact that the delivery orders were acknowledged by Stephen Gould did not negate the actual fact that the said deliveries were made to Sin Kwang and Wentel; (iii) the mere usage of the wrong form, *ie*, Form 9, as opposed to the LMW form, would not justify the imposition of import duty. The only recourse for the wrong usage of forms would be for the respondents to issue a compound to the applicant pursuant to the Customs Act 1967 ('Act'); (iv) the first respondent's decision to disallow the 50% remission, to serve as a lesson to the applicant, was erroneous in law; (v) the first respondent, in imposing the import duty as a punishment/to serve a lesson to the applicant, had exercised its powers unreasonably and acted *ultra vires*, as such imposition of import duty was not expressly provided for under the Act; (vi) the goods were indeed delivered to Sin Kwang and Wentel, and the respondents themselves conceded that there were no elements of deviation in the entire transaction; (vii) the respondents did not have the power to impose duties on the said deliveries on account of a breach of the LMW licence; and (viii) the decision of the respondents to impose tax or the non-remission was irrational and went against the spirit and intent of the law. The HCJ issued a *certiorari* order to quash the first respondent's decision but declined to declare that the bills of demand were null and void or to order a full refund directly. Instead, the matter was remitted to the respondents for reconsideration and re-assessment. Hence, the present appeals (i) by the respondents against the

A whole decision of the HCJ ('Appeal 422'); and (ii) by the applicant against part of the HCJ's decision which dismissed the applicant's declaratory reliefs sought in the judicial review, *ie*, a declaration that the bills of demand were null and void and that the applicant was entitled to a full remission and refund ('Appeal 423').

B **Held (allowing Appeal 422; dismissing Appeal 423)**
Per Ahmad Kamal Md Shahid JCA delivering the judgment of the court:

(1a) Since the LMW licencee was controlled *via* documentation, the usage of various forms was mentioned clearly in the PTK Bil. 27. The need to follow specific documents to control the movement of goods had been clearly stated in para. 8 of PTK Bil. 27. The striking features of PTK Bil. 27, which the applicant had to comply with were: (i) export sales must be at least 80%; (ii) for LMW to LMW to be considered as an export sale, it must be shown *via* Form GPB-1; (iii) local sale must be 20% or below; (iv) for local sale exceeding 20%, approval from MIDA or ATIGA was required; (v) local sale must be shown *via* Customs Form 9; and (vi) local sale must be delivered to the local company with a delivery order showing acceptance. (paras 30-32)

(1b) The applicant failed to comply with PTK Bil. 27. There was no proof that deliveries were made to Sin Kwang and Wentel. Delivery orders showed deliveries were made to Stephen Gould, and Stephen Gould then sent the goods to Sin Kwang and Wentel, which were later endorsed by them. Insofar as the whole transactions were involved, the applicant produced no single evidence to show that the deliveries were accepted *via* this channel from the applicant directly to Sin Kwang and Wentel. Since there were no documents to show delivery from one LMW, *ie*, the applicant to another LMW, *ie*, Sin Kwang and Wentel directly, these movements could not be considered as an export sale. (paras 33-34 & 36-37)

(2a) The HCJ erred in deciding that the applicant's deliveries were considered export in nature, which did not extract any tax, whilst the actual deliveries, based on documents, were made to Stephen Gould, a local trading company, and thus would be considered as a local sale, which was subjected to tax. The issuance of the bills of demand was justified since the applicant failed to produce any documents to show there was a direct delivery from LMW to LMW as proof of an export sale. (paras 38 & 39)

(2b) The HCJ erred in His Lordship's decision to accept the wrong form as a mere insignificant issue which did not attract tax. The HCJ failed to take into account that: (i) s. 65A(3)(b) of the Act clearly imposed a duty on goods released from LMW; and (ii) the proviso to s. 65A(3)(b) of the Act was only applicable to give tax exemption, subject to the

condition imposed. The applicant had breached the conditions imposed, and was thus liable to pay tax. Similarly, once the applicant exceeded the quota for the exemption of import duty for local sale as prescribed in the conditions of the licence, the second respondent was entitled to demand the import duty applicable as well as GST. The HCJ erred when His Lordship failed to take into account that the usage of the local sale form, which was paramount to the LMW's licence, would trigger a local sale quota, taking into consideration that the audit trail would only look at documents produced for inspection and control mechanisms. Therefore, the issuance of the bills of demand and rejection of 50% remission were well justified, rationally founded, and legally imposed by the respondents. (paras 49-53)

(3) The applicant ignored the usage of Borang GPB-1, but instead, the applicant, in the disguise of an export sale, used Customs Form 9 meant for local sale. Clearly, the applicant was adopting his own procedure instead of the established regulatory framework laid by the second respondent. The HCJ had clearly confused the whole scenario of the sale conducted by the applicant in disguise of an export sale by adopting His Lordship's own procedure instead of the established regulatory framework laid by the second respondent. The applicant's business model did not fall under the legally defined 'drop shipment' category, and the failure to comply with mandatory documentary procedures disqualified the transactions from being treated as export sales. As such, the imposition of tax was lawful and appropriate. (paras 67-69)

(4) Under s. 65A(3)(b) of the Act, import duty was automatically imposed on any goods released from an LMW unless specific conditions are met for exemption. Once those conditions are breached – such as by exceeding the 20% local sales quota – the statutory duty becomes payable, regardless of intent or purpose. Therefore, there was ample power stipulated by the substantive law to give absolute power to the second respondent to impose tax upon failure to adhere to conditions. The allegation, that any breach of the conditions of the licence by the applicant may only lead to compound or prosecution and revocation of the licence as expressly outlined in the licence, was untenable and devoid of merit. The first respondent had provided more than just a reason as to why further remission of 50% was denied. Serving as punishment was only one of the many reasons given, and the HCJ failed to consider many other reasons given, which resulted in a wrong conclusion by His Lordship. (paras 71-72 & 74)

(5) The refusal to allow a remission was entirely within the first respondent's lawful discretion under s. 14A of the Act, which empowered the first respondent to remit any part of customs duty if he

deemed it just and equitable, subject to conditions he may impose. As such, there was nothing illegal nor irrational as to the discretion exercised by the first respondent in refusing the 50% remission applied by the applicant. (paras 92 & 93)

Legislation referred to:
Customs Act 1967, ss. 2(1B), 14A, 65, 65A(3)(b)

(Civil Appeal No: P-01(A)-422-06-2024)
For the appellant - Aliza Jamaluddin & Amirul Hisyam Azedi Noor; SFC
For the respondents - Cheong Yew Sheng; M/s BC Teh & Yeoh

(Civil Appeal No: P-01(A)-423-06-2024)
For the appellant - Cheong Yew Sheng; M/s BC Teh & Yeoh
For the respondents - Aliza Jamaluddin & Amirul Hisyam Azedi Noor; SFC

[Editor's note: For the High Court judgment, please see Ha Pack Industry Sdn Bhd v. Menteri Kewangan Malaysia & Anor [2024] CLJU 1701 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid JCA:

Introduction

[1] There are two appeals fixed for hearing before us, which we heard on the same day. Firstly, Appeal P-01(A)-422-06-2024 (Appeal 422) filed by Kementerian Kewangan Malaysia (the first respondent) and Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia (the second respondent) (collectively referred to as the respondents). Secondly, is the appeal by Ha Pack Industry Sdn Bhd (the applicant) *via* Appeal P-01(A)-423-06-2024 (Appeal 423).

[2] Both parties are dissatisfied with the decision of the High Court in a judicial review (JR) application filed by the applicant who is aggrieved with the decision of the first respondent dated 22 May 2023, which conclusively rejected the applicant's appeal against the second respondent's decision refusing remission of the remaining 50% of the bills of demand amounting to RM903,757.22, which the applicant had previously paid.

[3] Having heard the appeals, scrutinising the records of appeal and submissions by both parties, we decided to allow the respondents' appeal in Appeal 422 and to dismiss the applicant's appeal in Appeal 423. These grounds of judgment (GOJ) contain the full reasons for our decision.

Brief Facts Of The Case

[4] The applicant is a licenced manufacturing warehouse (LMW) operator pursuant to ss. 65 and 65A of the Customs Act 1967 (the Act).

[5] The dispute centred around 675 drop shipment deliveries of raw materials from the applicant's warehouse to two other LMW companies, namely Syarikat Sin Kwang Plastic Industries Sdn Bhd (Sin Kwang) and Wentel Corporation Sdn Bhd (Wentel), between June and August 2017 (the said deliveries).

[6] These transactions involved a local trading company, Stephen Gould Malaysia Sdn Bhd (Stephen Gould), which ordered goods from the applicant for direct delivery to Sin Kwang and Wentel.

[7] The following process and manner of deliveries were undertaken:

(i) Sin Kwang and Wentel would order raw materials/components for the requirements of their manufacturing activities from Stephen Gould;

(ii) Stephen Gould would thereafter order the raw materials from the applicant;

(iii) upon completion of the same and upon request of Stephen Gould, the applicant would deliver the raw materials directly to Sin Kwang and Wentel respectively;

(iv) the applicant would subsequently issue an invoice requesting the payment from Stephen Gould; and

(v) Stephen Gould would then issue an invoice requesting for payment from Sin Kwang and Wentel, respectively.

[8] The applicant contends that the drop shipment transactions as above are permitted and should be considered as the applicant's export quota in accordance with the guidelines published by the Royal Malaysian Customs Department.

[9] Important to these proceedings is that *vide* a mutual non-disclosure agreement dated 1 March 2016 executed between the applicant and Stephen Gould, the applicant was prohibited from disclosing its identity to the customers of Stephen Gould, including, but not limited to Sin Kwang and Wentel.

[10] The applicant contends that it had then declared the said deliveries using Customs Form 9 when LMW General Form should have been used and requested Sin Kwang and Wentel to endorse 'delivery order' and Stephen Gould to acknowledge receipt of the deliveries, in which LMW Lampiran 1 should have been used.

[11] Pursuant to an audit conducted on the applicant, the second respondent took the position that the said deliveries were all local sales, and accordingly issued bills of demand, both dated 19 July 2019, demanding payment of goods and services tax (GST) amounting to RM102,312.14 as well as the payment of import duties amounting to RM1,705,202.31 (the bills of demand).

[12] The applicant had filed an appeal to the second respondent, dissatisfied with the issuance of the bills of demand.

[13] However, in the meantime, pending the appeal, the applicant had made payments by instalments totalling RM903,757.22, being 50% of the total sum demanded.

[14] *Vide* letter from the second respondent dated 12 December 2019, the applicant's appeal on the bills of demand was rejected on the following three grounds:

(i) that it did not fulfil the conditions of "drop shipment" terminology and drop shipment sale involving LWM completed goods pursuant to Butiran 3.7 and Butiran 11, Perintah Tetap Kastam Bil. 27 dated 2 June 2017 (PTK Bil. 27);

(ii) that the delivery orders were purportedly acknowledged receipt by Stephen Gould instead of Sin Kwang and Wentel; and

(iii) that the movement of the goods was declared using Customs Form 9, purportedly showing that they were local sales.

[15] The applicant's further appeal to the first respondent had only resulted in an unpaid remission of 50% of the total sum *via* a decision reflected in a letter from the first respondent dated 22 May 2023. However, the applicant's application/appeal for the remission of the remaining 50% already paid under the bills of demand, amounting to RM903,757.22, was rejected with finality without providing any new and/or further reasons.

In The High Court

[16] The above-said decision led to the filing of a JR by the applicant in the High Court.

[17] The specific reliefs or orders sought by the applicant are, briefly, as follows:

(i) a declaration that the bills of demand by the second respondent are of no effect, null and void, and absolutely not binding on the applicant;

(ii) a declaration that all transactions which are the main subject under the bills of demand in respect of the said deliveries of goods by the applicant to Sin Kwang and Wentel be considered:

(a) as the applicant's export quota, and

(b) not to be subject to any GST and/or import duty.

(iii) an order of *certiorari* to quash the decision by the first respondent in their letter dated 22 May 2023, which conclusively rejected the application/appeal by the applicant for the remission of the remaining 50% of the bills of demand amounting to RM903,757.22 previously paid by the applicant;

(iv) a declaration that the applicant is entitled to remission and refund of the remaining 50% or import duty and GST amounting to RM903,757.22 previously paid by the applicant; and

(v) an order that the matter of the remission or both GST and import duty in the bills of demand be now referred back by this Honourable Court to be reconsidered/reassessed by the respondents according to the spirit and intent of this order and to take appropriate steps to give full effect to this order.

Findings Of The Learned High Court Judge

[18] After hearing the substance of the JR, the learned High Court Judge (HCJ) partially allowed the applicant's application, among others, on the following grounds:

(i) the decision to impose import duties and GST due to the alleged non-fulfilment of the definition of drop shipment under Butiran 3.7 of PTK Bil. 27 was irrational and without basis;

(ii) the mere fact that the delivery orders were acknowledged by Stephen Gould does not negate the actual fact that the said deliveries were made to Sin Kwang and Wentel;

(iii) the mere usage of the wrong form, *ie*, Form 9, as opposed to LMW form, would not justify the imposition of import duty. The only recourse for the wrong usage of forms would be for the respondents to issue a compound to the applicant pursuant to the Act;

(iv) the first respondent's decision to disallow the 50% remission to serve as a lesson to the applicant is erroneous in law;

(v) the first respondent, in imposing the import duty as a punishment/to serve a lesson to the applicant, had exercised its powers unreasonably and acted *ultra vires*, as such imposition of import duty was not expressly provided for under the Act;

(vi) the goods were indeed delivered to Sin Kwang and Wentel, and the respondents themselves conceded that there were no elements of deviation in the entire transaction;

(vii) the respondents do not have the power to impose duties on the said deliveries on account of a breach of the LMW licence; and

(viii) therefore, the decision of the respondents to impose tax or the non-remission was irrational and went against the spirit and intent of the law.

[19] As a conclusion, the learned HCJ issued a *certiorari* order to quash the first respondent's decision *vide* their letter dated 22 May 2023 rejecting the remission as requested. However, the learned HCJ declined to declare the bills of demand null and void or to order a full refund directly. Instead, the matter was remitted to the respondents for reconsideration and reassessment in accordance with the spirit and intent of the law.

The Appeals

[20] Dissatisfied, both parties now file their respective appeal to the Court of Appeal against the said decision *via* these two appeals, as mentioned earlier:

(i) the respondents, *via* Appeal 422, appeal against the whole decision of the High Court; and

(ii) the applicant, *via* Appeal 423, appeals against part of the decision which dismissed the applicant's declaratory reliefs sought in the JR, *ie*, a declaration that the bills of demand are null and void and that the applicant is entitled to a full remission and refund.

Appeal 422

[21] The respondents, as the appellants in Appeal 422, submitted, among others:

(i) the applicant as LMW holder, eligible to enjoy facilities, but the end products are subject to an export quota of 80% and local sale of 20% and below;

(ii) the quota conditions have been set in the licence; thus, the applicant is well aware of the conditions;

(iii) the operation, raw materials, export sales, and local sales are controlled *via* documentation which are subject to audit;

(iv) the audit trail discovered that the local sales were in excess of the quota without the Malaysian Investment Development Authority (MIDA) approval or exemption under ASEAN Trade in Goods Agreement (ATIGA) as they are limited to the percentage of total local sales allowed under s. 65A of the Act;

(v) the bills of demand issued by the second respondent are legally valid because the applicant (company) was found to have clearly manipulated the local sale in the guise of an export quota by adopting a business model unknown to the second respondent;

(vi) the applicant has also been found trying to mislead the authorities by manipulating the forms used for local sales, and this situation has been detected by the second respondent;

(vii) as an experienced LMW company, there cannot be an excuse for wrongful use of forms, since this is crucial to the determination of quota;

(viii) therefore, the imposition of tax by the second respondent was found to be orderly and in accordance with procedures and legislation; and

(ix) despite that, 50% remission has been approved. Further remission should not be allowed because, in addition to the various reasons given, it can serve as a lesson to the appellant.

Appeal 423

[22] The applicant, as the appellant in Appeal 423, submitted, among others:

(i) without such a declaration granted, and just by quashing the decision of the first respondent not granting full remission on import duty and GST and remitting the matter back to the first respondent to consider and reassess, the matter poses a risk that the first respondent may again refuse to grant a full remission of GST and import duties to the applicant, when the applicant was found to be not liable to pay GST and import duties; and

(ii) without any declaration, the first respondent may take this opportunity to grant the applicant either 50% or 70% remission, although it was found that the applicant is not liable to pay at all, and as a result thereof, the applicant would be required to file a second JR to quash the first respondent's decision. This will lead to a vicious cycle that has no end. It defeats the purpose of the applicant filing the JR in the very first place, which was not only to quash the first respondent's decision, but also to determine its liability to pay GST and import duties.

Our Findings

Appeal 422

[23] We will first deal with Appeal 422 filed by the respondents.

Delivery Orders

[24] The applicant is a local company with the status of LMW under s. 65A of the Act. With this status, any importation of raw materials/components/equipment/machines to manufacture the end products will be exempted from import duty and sales tax. (See: LMW Licence: encl. 4 p. 92).

[25] The licence was subjected to certain conditions imposed by the respondents, *ie*, 80% of the end products must be for export purposes and 20% can be distributed locally. The applicant may apply to the respondents for the tax exemption for the 20% local distribution. If the sale exceeded the 20% local sales quota, the applicant is liable to pay tax.

[26] Alternatively, for any local sales that exceeded 20%, the applicant is entitled to another tax relief by applying to MIDA for an increased quota.

[27] The applicant has another option of applying to the second respondent for the exceeded 20% local sale quota for ATIGA duty import rate. (See: affidavit respondents: encl. 4 p. 56). (See: ATIGA's approval subject to LMW's licence: encl. 4 pp. 148 to 149).

[28] It is to be noted that the applicant is an LMW licensee. LMW licensees are subjected to various provisions, and the provisions concerned are vastly based on documentation. The only means of control for LMW is based on documentation produced to the first respondent during the audit trail. Therefore, compliance with documentation is central to the regulation of LMW.

[29] The relevant provisions concerning LMW are as follows:

(i) Section 65A of the Act reads as follows:

> Manufacture and other operations in relation to goods in licenced warehouse
>
> 65A(1) The Director General may, on payment of such fees as may be fixed by him in each case, grant a licence to any person and when granted withdraw, suspend or cancel any such licence, to carry on any manufacturing process and other operation in respect of the goods liable to customs duties and any other goods.
>
> (1A) A licence under subsection (1) shall be deemed to include a licence for warehousing goods as provided under section 65.
>
> (2) *Any such licence shall be for such period and subject to such conditions as the Director General may specify in the licence.*
>
> (3)(a) No goods which have undergone any manufacturing process in the licenced manufacturing warehouse may be released for home consumption or export without the prior approval of the Director General.
>
> (b) *If such goods are released from the warehouse for home consumption the customs duty thereon shall be calculated on the basis as if such goods had been imported:*
>
> *Provided that the Minister may in any particular case exempt any person from the payment of the whole or part of such duty which may be payable by such person on any such goods and in granting such exemption the Minister may impose such conditions as he may deem fit.*
>
> (emphasis added)

(ii) PTK Bil. 27, where the relevant provisions are as follows:

Para No.	Provisions
3.	Terminology
3.7.	Drop shipment
	Drop shipment melibatkan penghantaran terus dagangan dari pemegang lesen kepada syarikat di Kawasan Utama Kastam (KUK) yang merupakan pelanggan kepada pengedar yang berada di luar Malaysia. Transaksi drop shipment ini dianggap sebagai jualan tempatan untuk maksud kiraan kuota.
5	Syarat-syarat GPB (Gudang Pengilangan Berlesen)
5.1.	Kemudahan GPB hanya diberi kepada pengilang yang mengeksport tidak kurang dari 80% daripada jumlah nilai jualan barangan siap bagi tempoh 12 bulan (dalam tempoh perlesenan). Keperluan ini boleh diberi kelonggaran dari masa ke semasa bergantung kepada kelulusan pihak Lembaga Pembangunan Pelaburan Malaysia (MIDA).
6.7	Syarat-syarat Lesen
6.7.1.	Syarat-syarat Lesen Gudang Mengilang di bawah seksyen 65A Akta Kastam 1967 adalah seperti di Lampiran C.
10	Dasar Percukaian Ke Atas Jualan Tempatan
10.1.	Penjualan barangan siap GPB ke pasaran tempatan perlu dibayar duti import mengikut Perintah Duti Kastam 2017. Walau bagaimanapun, pemegang lesen boleh memohon untuk membayar duti import pada kadar bersamaan ATIGA mengikut Perintah Duti Kastam (Barang-Barang Berasal Dari Negeri-Negeri ASEAN) (Tatanama Tariff Berharmonis ASEAN dan Perjanjian Perdagangan Barangan ASEAN) 2012 (ATIGA). Pemegang lesen perlu mematuhi syarat tempasal sekurang-kurangnya 40% nilai kandungan bahan mentah tempatan dan dari Negara ASEAN.
10	Dasar Percukaian Ke Atas Jualan Tempatan
10.6.4.	Kelulusan ini membenarkan jualan barang siap ke pasaran tempatan dengan membayar duti import bersamaan kadar duti ATIGA adalah terhad kepada peraturan kuota jualan tempatan yang telah ditetapkan di dalam Lesen GPB (Lampiran C). *Kelulusan ini akan TERBATAL sekiranya berlaku pelanggaran syarat dan duti import hendaklah dipungut semula mengikut kadar semasa.*

11	Penjualan Secara Drop Shipment Yang Melibatkan Barangan Siap GPB
11.1	Aktiviti penjualan secara drop shipment adalah dibenarkan ...
11.2.	Pengikraran barang hendaklah menggunakan Borang Kastam No. 9 oleh pengimport/pembeli di Malaysia ...
11.2.2.	Nyatakan nama syarikat pengimport/pembeli sebenar di ruang dalam Borang Kastam No. 9.
15	Pergerakan Barang-barang Eskport
15.3	Barangan siap GPB yang dijual/pindah kepada GPB lain sebagai bahan mentah/komponen adalah dianggap sebagai 'eksport' bagi tujuan pengiraan kuota export. Pergerakan barang-barang tersebut hendaklah menggunakan GPB No. 1 seperti di Lampiran Q.

(emphasis added)

[30] Since the LMW licensee is controlled *via* documentation, the usage of various forms is mentioned clearly in the PTK Bil. 27. Thus, an audit is conducted to ensure checks and balances commensurate with the need for adherence, and it shall be based solely on the documentation.

[31] The need to follow specific documents to control the movement of goods has been clearly stated in para. 8 of PTK Bil. 27.

[32] Given the above, we find that the striking features of PTK Bil. 27, which the applicant as LMW licensee had to comply with, are as follows:

(i) export sales must be at least 80%;

(ii) for LMW to LMW to be considered as an export sale, it must be shown *via* Form GPB1;

(iii) local sale must be 20% or below;

(iv) local sale exceeding 20%, approval from MIDA or ATIGA is required;

(v) local sale must be shown *via* Customs Form 9; and

(vi) local sale must be delivered to the local company with a delivery order showing acceptance.

[33] Coming back to the facts in the present case, having perused the evidence produced before us, we find that the applicant failed to comply with PTK Bil. 27.

[34] Based on the documentation produced by the applicant, we find that there was no proof that deliveries were made to Sin Kwang and Wentel. Delivery orders shown deliveries were made to Stephen Gould, and Stephen Gould then sent the goods to Sin Kwang and Wentel, which were later endorsed by them.

[35] These were proven *via* documents, and it cannot be refuted by the presumed fact that the actual deliveries were a direct delivery from the applicant to Sin Kwang and Wentel. No documents were produced to support this presumed *modus operandi*.

[36] Insofar as the whole transactions were involved, we find that the applicant produced no single evidence to show that the deliveries were accepted *via* this channel from the applicant directly to Sin Kwang and Wentel.

[37] We are of the considered view that since there are no documents to show delivery from LMW (Ha Pack) (applicant) to another LMW (Sin Kwang and Wentel) directly, these movements cannot be considered as an export sale.

[38] We are also of the opinion that the learned HCJ has erred in deciding that the applicant's deliveries were considered export in nature, which does not extract any tax, whilst the actual deliveries, based on documents, were made to Stephen Gould, a local trading company, and thus will be considered as a local sale, which is subjected to tax.

[39] We are of the view that the issuance of the bills of demand is justified since the applicant has failed to produce any documents to show there is a direct delivery from LMW to LMW as proof of an export sale.

Usage Of The Wrong Form

[40] The learned HCJ was also wrong when His Lordship decided that the respondents appeared to be more preoccupied with form rather than substance.

[41] We take note that in the case of LMW, or even in other cases involving tax, be it personal tax, business tax, import and export tax, the control mechanism is only by way of documentation. To adopt the opinion that 'form is not important but rather the substance' would negate the whole idea of having an audit trail, as the audit would only look at the documentation.

[42] The law is very clear. Paragraph 15 of PTK Bil. 27 clearly stated as follows:

15.	Pergerakan Barang-barang Eksport
15.1	Pengeksportan barangan daripada kilang GPB hendaklah menggunakan Borang Kastam No. 2 secara online submission. Sekiranya sistem SMK tidak berfungsi (offline) maka pengikraran bolehlah dibuat secara manual selaras dengan fallback method. Barangan siap GPB yang dijual/pindah kepada GPB lain sebagai bahan mentah/komponen adalah dianggap sebagai 'eksport' bagi tujuan pengiraan kuota export. Pergerakan barang-barang tersebut hendaklah menggunakan GPB No. 1 seperti di Lampiran Q.

[43] And again, in para. 8 of PTK Bil. 27, it has clearly provided as follows:

Bil.	Pergerakan	Dokumen	Peruntukan Undang-undang
1.	GPB ke GPB (keluar dan masuk)	Penyata GPB-1	Per. 30(5) Peraturan-peraturan 1977

[44] In the instant case, we find that instead of using GPB-1, the applicant, on his own accord, opted for Customs Form 9. There was no consultation whatsoever with the second respondent regarding the use of Customs Form 9.

[45] It is to be noted that Customs Form 9 is obviously meant for local sale as stated in para. 8 of PTK Bil. 27:

II.	a. GPB menghantar bahan mentah/komponen untuk kerja subkontrak (farming out) kepada Syarikat Tempatan (KUK)	Borang Kastam No. 9 Delivery Order (DO)	Per. 29(1)(a) Peraturan-peraturan 1977 Butiran 84 PDK (P) 2013

[46] Even assuming that the applicant was right in his choice of Customs Form 9, we find that the applicant has stated that the actual buyer is Stephen Gould and not Sin Kwang or Wentel. (See: encl. 4 p. 112 for delivery to Sin Kwang and encl. 4 p. 120 for delivery to Wentel).

[47] The need to state the exact buyer can be found in para. 11.2.2 of PTK Bil. 27:

> Nyatakan nama syarikat pengimport/pembeli sebenar di ruang 2 dalam Borang Kastam No. 9.

[48] Thus, even if going through the format of Customs Form 9, the applicant had also failed to adhere to the said requirement. Upon reviewing Customs Form 9, as completed by the applicant, it is revealed that the actual buyer is Stephen, a local trading company. Thus, it must be a local sale.

[49] Given the above, we are of the view that the learned HCJ had erred in his decision to accept the wrong form as a mere insignificant issue which does not attract tax. In so deciding, the learned HCJ has failed to take into account that:

(i) section 65A(3)(b) of the Act clearly imposed a duty on goods released from LMW; and

(ii) proviso to s. 65A(3)(b) of the Act is only applicable to give tax exemption, subject to the condition imposed.

[50] Based on the explanation given above, we are of the view that the applicant has breached the conditions imposed and is thus liable to pay tax.

[51] Similarly, once the applicant exceeded the quota for the exemption of import duty for local sale as prescribed in the conditions of the licence, the second respondent is entitled to demand the import duty applicable as well as GST.

[52] The learned HCJ erred when he failed to take into account that the usage of the local sale form, which is paramount to the LMW's licence, will trigger a local sale quota, taking into consideration that the audit trail will only look at documents produced for inspection and control mechanisms.

[53] Thus, we are of the considered view that the issuance of the bills of demand and rejection of 50% remission are well-justified, rationally founded, and legally imposed by the respondents.

Drop Shipment

[54] The learned HCJ had decided that the decision to consider the said deliveries as local sale is irrational since the second respondent has taken a stand that the said deliveries were not "drop shipment" within PTK Bil. 27, but at the same time considered the same as local sale.

[55] This can be gleaned from the learned HCJ's GOJ in para. 34 when His Lordship stated as follows:

> [34] I have also noted that whilst the 2nd Respondent had stated that the said deliveries do not fall under the definition of Butiran 3.7 of Perintah Tetap Kastam Bil. 27, they concluded in their letter dated 19th July 2019 that the said deliveries are considered as local sales quota as opposed to export quota. In my view, there certainly seems to be merit that to say that the said deliveries do not fall under the definition of Butiran 3.7 of the Perintah Tetap Kastam Bil. 27, but at the same time take the position that the said deliveries are tantamount to local sales quota is irrational and without basis.

[56] We find that the learned HCJ fell into error in his appreciation of the "drop shipment" concept as applied within the second respondent's regulatory framework.

[57] The second respondent's regulatory framework has defined drop shipment in para. 3.7 of PTK Bil. 27 as follows:

> 3.7 Drop shipment
>
> Drop shipment melibatkan penghantaran terns dagangan dari pemegang lesen kepada syarikat di Kawasan Utama Kastam (KUK) yang merupakan pelanggan kepada pengedar yang berada di luar Malaysia. Transaksi drop shipment ini dianggap sebagai jualan tempatan untuk maksud kiraan kuota.

[58] Under this provision, drop shipment involves a scenario where an overseas buyer instructs a Malaysian LMW manufacturer to deliver goods directly to a local customer (typically within the Kawasan Utama Kastam (KUK)). In such a case, the transaction is deemed a local sale for the LMW, even if the buyer is arranged through an overseas party.

[59] However, we find that this business model does not fit the *modus operandi* adopted by the applicant. The applicant is not located overseas, and Sin Kwang and Wentel are not local companies located in Kawasan Utama Kastam (KUK). Both Sin Kwang and Wentel are LMW. Thus, it cannot be a local sale to the applicant.

[60] We find that the second respondent's regulatory framework has allowed drop shipment by LMW to be considered as an export sale in four situations, which are well explained in "Panduan Bahagian Perkastaman – Aktiviti Jual Beli Syarikat Berstatus Gudang Pengilangan Berlesen (GPB) Melibatkan Syarikat Pedagang" (Guideline).

[61] The learned HCJ in para. 32 of his GOJ had referred to the fourth situation stated in the guideline to the situation that fit the applicant's business model when he said as follows:

> [32] Reference is also made to the guidelines provided by the customs department which provides that "drop shipment" involving deliveries of raw materials from one LMW to another LMW involving either local or foreign trading company is allowed and the sales quota for the LMW in that situation is categorised as export quota. An excerpt of the said guidelines is reproduced below:
>
> i. Pemegang lesen GPB adalah dibenarkan untuk menjalankan aktiviti jual beli dan memindahkan barang yang melibatkan syarikat pedagang di luar/dalam Malaysia. Dasar semasa menyatakan jualan barang siap GPB ke Kawasan Utama Kastam (KUK) adalah tertakluk kepada duti import, duti eksais dan cukai jualan sebagaimana peruntukan perundangan di bawah seksyen 65A(3)(b) Akta Kastam 1967, seksyen 28 Akta Eksais 1976 dan seksyen 57(b) Akta Cukai Jualan 2018.

...

c. Delivery Order (DO) hendaklah dinyatakan seperti dalam borang K2 iaitu syarikat penghantar adalah di atas nama GPB care of (bagi pihak) pedagang (nama penuh pedagang dan alamat) manakala syarikat penerima adalah di atas nama GPB pelanggan di Kawasan Zon Bebas.

d. Kuota jualan syarikat GPB dalam keadaan ini dikategorikan sebagai memenuhi kuota jualan eksport.

[62] The fourth situation involved "pedagang membeli barang daripada GPB dan mengarahkan GPB memindahkan barang berkenaan kepada pelanggan di Zon Bebas".

[63] Free Zone is defined by s. 2(1B) of the Act as any area in Malaysia which has been declared by the Minister to be a free commercial zone and a free industrial zone under the Free Zones Act 1990.

[64] In the instant case, we find that there is no evidence that Sin Kwang and Wentel were located in Zon Bebas. There was no involvement of Form K2 in the whole episode. Thus, we are of the view that the learned HCJ has erred in reference to the fourth situation. This error leads to the wrongful conclusion that the usage of Form K9 by the applicant is justified and that the sale constitutes an export sale.

[65] Further, we find that the learned HCJ has failed to take into consideration that the applicant's *modus operandi* is more likely to fit the third situation, which involved "pedagang membeli barang daripada GPB dan mengarahkan GPB (penjual) memindahkan barang berkenaan kepada pelanggan berstatus GPB (pelanggan)", which fulfils this third situation, will entitle the LMW to claim a sale of export quota.

[66] To be able to claim an export quota under this type of drop shipment, the applicant must comply with the five conditions, which are clearly spelled out in the guidelines, where the usage of Form GPB-1 is crucial in determining a sale from LMW to LMW. In fact, the same information must also be included in the delivery order. Failure to comply with all the conditions above will not entitle LMW to claim that its sale constitutes an export quota.

[67] In the present facts, we find that the applicant has ignored the usage of Form GPB-1, but instead, the applicant, in the disguise of an export sale, used Customs Form 9 meant for local sale. Clearly, the applicant was adopting his own procedure instead of the established regulatory framework laid by the second respondent.

[68] Given the above, we are of the view that the learned HCJ has clearly confused the whole scenario of the sale conducted by the applicant in disguise of an export sale by adopting his own procedure instead of the established regulatory framework laid by the second respondent.

[69] All in all, we are of the view that the applicant's business model does not fall under the legally defined "drop shipment" category, and the failure to comply with mandatory documentary procedures disqualifies the transactions from being treated as export sales. As such, the imposition of tax was lawful and appropriate.

The Decision To Impose Tax Serves As A Lesson To The Applicant

[70] The learned HCJ has decided that any non-compliance with the LMW licence would only result in revocation of the licence or imposition of a compound and that the imposition of tax by the respondents was erroneous in law, especially since it appeared to be done "to teach the applicant a lesson".

[71] We find that under s. 65A(3)(b) of the Act, import duty is automatically imposed on any goods released from an LMW unless specific conditions are met for exemption. Once those conditions are breached – such as by exceeding the 20% local sales quota – the statutory duty becomes payable, regardless of intent or purpose. Therefore, we view that there is ample power stipulated by the substantive law to give absolute power to the second respondent to impose tax upon failure to adhere to conditions.

[72] Therefore, the allegation that if there is any breach of the conditions of the licence by the applicant may only lead to compound or prosecution and revocation of the licence as expressly outlined in the licence is untenable and devoid of merit.

[73] The learned HCJ has also decided that the first respondent's decision to refuse further 50% remission was exercised unreasonably when it was done to serve as a punishment/lesson to the applicant. (See: para. 52 of the GOJ).

[74] We find that the first respondent has provided more than just a reason as to why further remission of 50% is denied. Serving as punishment is only one of the many reasons given, and the learned HCJ has failed to consider many other reasons given, which resulted in a wrong conclusion by His Lordship.

[75] In para. 6.8 of the first respondent affidavit, the reasons are as follows: (See: encl. 4 p. 77):

> 6.8 Permohonan Pemohon untuk mendapatkan remisi 50% ke atas baki bil tuntutan duti import dan cukai barang dan perkhidmatan tidak diluluskan berdasarkan justifikasi berikut:
>
> i) Bahagian Cukai, Kementerian Kewangan berpandangan keputusan penolakan ke alas permohonan Pemohon sebelum ini adalah wajar kerana Pemohon tidak mematuhi syarat dan peraturan GPB. Namun, pertimbangan kelulusan 50% diberi apabila semakan mendapati tiada unsur penyelewengan

sepanjang transaksi berlaku. Kelulusan diberikan sebanyak 50% sahaja kerana Pemohon tidak mematuhi prosedur yang ditetapkan di bawah GPB;

ii) Setiap syarikat mempunyai trend perniagaan tersendiri. Namun, sebagai syarikat berstatus GPB, Pemohon seharusnya lebih peka dan merujuk kepada JKDM terlebih dahulu mengenai business model syarikat sebelum mula beroperasi. Sekiranya syarikat enggan berbuat demikian dan ingin menjalankan model perniagaan dengan kaedah tersendiri sekaligus gagal mematuhi syarat-syarat GPB sedia ada, syarikat adalah digalakkan untuk menyerah kembali lesen GPB dan melaksanakan pengilangan di KUK. Syarikat boleh merujuk dengan JKDM untuk menikmati kemudahan-kemudahan yand disediakan kepada pengilang.

iii) Sehubungan dengan itu, Kementerian Kewangan berpandangan permohonan rayuan meremitkan baki 50% ke atas bil tuntutan duti import dan cukai barang dan perkhidmatan berjumlah RM903,757.22 tidak boleh dipertimbangkan; dan

iv) Keputusan ini adalah muktamad dan sebarang rayuan tidak diterima.

[76] According to the above averment, the first respondent has stated that the 50% remission was refused due to:

(i) the applicant has failed to adhere to the condition, procedure, and regulation pertaining to LMW;

(ii) the applicant, as a company, has opted for its own business model but failed to consult the second respondent on a proper business model to be adopted as LMW;

(iii) as LMW, the applicant is controlled by rules. If the applicant is unable to abide by the rules, the applicant is advised to surrender the licence and conduct business outside LMW, where the applicant can enjoy other facilities; and

(iv) based on the reasons above, the remaining 50% remission was denied, and the decision is final.

[77] We are of the view that if the learned HCJ had kept the above reasons at the forefront of his judicial analysis, then it is very likely that His Lordship might have come to a different conclusion.

Non-Disclosure Agreement

[78] The applicant attempted to justify its usage of Form K9 and omission of Form GPB-1 by claiming it was bound by a non-disclosure agreement (NDA) with Stephen Gould. According to the applicant, this NDA restricted disclosure of the end purchasers (Sin Kwang and Wentel), allegedly preventing the applicant from naming them as buyers on the customs forms and delivery documents.

[79] We find that this explanation is not only unconvincing but also irrelevant in the context of LMW compliance. If the applicant's business arrangement required deviation from standard LMW procedures, it had every opportunity to seek guidance or clarification from the second respondent beforehand. However, we find that no such consultation was ever made.

[80] Bottom line, we find that the business model adopted by the applicant does not meet the LMW criteria, and the applicant has never consulted the second respondent in doing so.

[81] Given the above, we are of the view that the existence of an NDA does not excuse the applicant's failure to use proper forms or document its transactions in accordance with LMW regulations.

[82] Therefore, we view that the decision to issue the bills of demands and deny further remission was lawful and rational, given that the applicant chose to proceed with a model that knowingly conflicted with the licensing terms.

ATIGA

[83] ATIGA is an agreement signed between ASEAN countries to facilitate the free flow of goods within the ASEAN region, by providing a comprehensive framework aimed at reducing trade barriers among the ASEAN countries. In order to qualify for the ATIGA rate of duty (0%), the goods must be shown to originate from ASEAN countries.

[84] The applicant argued that even if the sales were considered local and exceeded the 20% quota, the transactions should still be eligible for 0% import duty under ATIGA.

[85] However, we find that this argument is fundamentally flawed. While ATIGA allows for reduced or zero import duty on qualifying ASEAN-origin goods, this preferential treatment is subject to strict conditions, including compliance with LMW licensing terms.

[86] In other words, the 0% ATIGA rate was limited to sales within the 20% local quota. Once that quota is breached without prior approval from MIDA or additional ATIGA clearance, the exemption automatically lapses, and import duty becomes payable at the prevailing rate. (See; para. 10.6.4 of PTK Bil. 27).

[87] Given the above, we are of the view that the applicant, even relying on ATIGA, cannot avoid paying tax in view of the local sales quota exceeding the limit.

Exercise Of Discretion

[88] As to the issue of remission, the issue to be decided by the court is whether the first respondent had exercised his discretion correctly.

[89] The first respondent has decided to allow first remission on 50% and refused to allow another 50% remission, and the grounds were well spelt out in paras. [75] and [76] above. (See: encl. 4 pp. 76 to 77).

[90] We are of the view that so long as the first respondent exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters, or that his decision militates against the object of the statute.

[91] Based on the evidence presented before the court, we are of the considered opinion that the decision of the first respondent was justified and reasonable in the way that conclusions are based on:

(i) the applicant who is an LMW holder, eligible to enjoy facilities, but the end product is subject to an export quota of 80% and local sale of 20%;

(ii) the quota conditions have been set in the licence; thus, the applicant is well aware of the conditions;

(iii) the operation, raw materials, export sales, and local sales are controlled *via* documentation which are subject to audit;

(iv) the audit trail discovered that the local sales exceeded the quota without MIDA approval or exemption under ATIGA, as they are limited to the percentage of total local sales allowed under s. 65A of the Act;

(v) the bills of demand issued by the second respondent are legally valid because the applicant (company) was found to have clearly manipulated the local sale in disguise of an export quota by adopting a business model unknown to the second respondent;

(vi) the applicant has also been found trying to mislead the authorities by manipulating the forms used for local sales, and this situation has been detected by the second respondent;

(vii) as an experienced LMW company, there cannot be an excuse for the wrongful use of forms since this is crucial to the determination of quota; and

(viii) therefore, the imposition of tax by the second respondent was found to be orderly and in accordance with procedures and legislation.

[92] We are of the view that the refusal to allow a remission was entirely within the first respondent's lawful discretion under s. 14A of the Act, which empowers the first respondent to remit any part of customs duty if he deems it just and equitable, subject to conditions he may impose.

[93] As such, we view that there is nothing illegal nor irrational as to the discretion exercised by the first respondent in refusing the 50% remission applied by the applicant.

[94] Based on the reasons given above, we allow the respondents' appeal.

Appeal 423

[95] This is the applicant's appeal against part of the decision of the learned HCJ, which dismissed the applicant's declaratory reliefs sought in the JR, *ie*, a declaration that the bills of demand are null and void and the applicant is entitled to a full remission and refund.

[96] To avoid any repetition, based on our findings in Appeal 422, *inter alia*, that the issuance of the bills of demand and rejection of 50% remission are well-justified, rationally founded, and legally imposed, thus, we find that this appeal has no merit.

Conclusion

[97] Based on the reasons above, we find that the learned HCJ erred in partially allowing the applicant's JR application.

[98] We therefore unanimously set aside the decision of the High Court dated 24 May 2024. The respondents' Appeal 422 is hereby allowed, and the applicant's Appeal 423 is hereby dismissed.

[99] We also order costs as follows:

(i) Appeal 422:

(a) the applicant to pay the respondents costs of RM15,000 without allocator; and

(ii) Appeal 423:

(a) the applicant to pay the respondents costs of RM15,000 without allocator.